

REMARKS/ARGUMENTS

Status of the Claims

Claims 71-75 have been allowed.

Claims 22-27, 58, and 62-70 stand rejected.

Claims 1-21, 28-57, and 59-61 have been previously cancelled.

Claim 22 has been amended to delete parts (b) and (e) without prejudice or disclaimer in the interest of expediting examination of the instant application. Applicants expressly reserve the right to file one or more continuing applications or take such other appropriate measures deemed necessary to protect the subject matter omitted from claim 22 and its dependent claims.

No new matter has been added by way of amendment of the claims.

Reexamination and reconsideration of the application as amended are respectfully requested.

The Rejection of the Claims under 35 U.S.C. § 103(a) Should Be Withdrawn

Claims 22-27, 58, and 62-70 remain rejected under 35 U.S.C. § 103(a) as being unpatentable over Pozniak *et al.*, U.S. Patent Publication No. 2004/0237134, which claims the benefit of U.S. Provisional Application No. 60/311,282, filed August 9, 2001. Claim 22 has been amended. This rejection is respectfully traversed.

The Office Action indicates that the rejection of claims 22-27, 58, and 62-70 is repeated for the reason of record as set forth in the Office Action mailed August 28, 2009. The Office Action further indicates that the Applicants' arguments as set forth in their response filed

Appl. No.: 10/520,738
Amdt. dated October 29, 2009
Reply to Office Action of April 29, 2009

February 11, 2009 were not found to be persuasive because Applicants are claiming derivatives and descendants of a wheat plant and not an isolated nucleic acid and that Pozniak *et al.* enjoys the priority date of August 9, 2001.

Applicants continue to respectfully disagree with the rejection of claims 22-27, 58, and 62-70 and again point out that the Examiner has failed to raise a *prima facie* case of obviousness against these claims over Pozniak *et al.* for the reasons stated in their last response. Yet, in order to expedite the progress of this Application, Applicants hereby amend claim 22, with the understanding – as described in the Specification – that although a “progeny” might not be identical to any of its parents or earlier ancestors, the progeny will still exhibit the trait of herbicide tolerance that arises from its inherited, mutation-containing ALS gene(s). Accordingly, Applicants submit that claims 22-27, 58, and 62-70 are not obvious in view of Pozniak *et al.* because Pozniak *et al.* does not teach or even suggest the wheat plants, seeds, plant part and plant cells as presently claimed.

In view of the amendment and remarks, it is submitted that the rejection of the claims under 35 U.S.C. § 103(a) should be withdrawn.

CONCLUSION

In view of the above amendments and remarks, Applicants submit that the rejection of the claims under 35 U.S.C. § 103 is overcome. Applicants respectfully submit that this application is now in condition for allowance. Early notice to this effect is solicited.

If in the opinion of the Examiner a telephone conference would expedite the prosecution of the subject application, the Examiner is invited to call the undersigned.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of

Appl. No.: 10/520,738
Amdt. dated October 29, 2009
Reply to Office Action of April 29, 2009

this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefor (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,

/david m. saravitz/

David M. Saravitz
Registration No. 55,593

Customer No. 55392
ALSTON & BIRD LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Tel Raleigh Office (919) 862-2200
Fax Raleigh Office (919) 862-2260

ELECTRONICALLY FILED USING THE EFS-WEB ELECTRONIC FILING SYSTEM OF THE UNITED STATES PATENT & TRADEMARK OFFICE ON OCTOBER 29, 2009.